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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, FOR THE USE OF NADINE Y. LEVIN, ET AL., AND STATE OF MARYLAND FOR THE USE OF SIDNEY L. JOHNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (R. 708) are reported at 329 F. 2d 722. The opinion of the district court (R. 691) is reported at 200 F. Supp. 475.

JURISDICTION

The judgments of the court of appeals were entered on April 1, 1964, and a timely petition for rehearing was denied on April 28, 1964 (R. 731-732, 733). On June 23, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 25, 1964 (R. 734). The petition was filed on August 3, 1964, and was granted on Oc-

tober 19, 1964 (R. 734; 379 U.S. 877). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for the negligence of a pilot who is both a commissioned officer and a civilian employee of the Maryland Air National Guard.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Constitution, statutes and regulations involved are set forth in the appendix to this brief, pp. 61–67, *infra*.

STATEMENT

On May 20, 1958, a passenger airplane owned by Capital Airlines collided over Brunswick, Maryland, with a jet trainer airplane owned by the United States and assigned to the Air National Guard of Maryland. Both airplanes were destroyed and all of the passengers and crew were killed except for the pilot of the National Guard aircraft, Julius R. McCoy. At the time of the accident, McCoy was both a commissioned officer in the Maryland Air National Guard and a civilian employee of the National Guard receiving pay from federal funds under Section 90 of the National Defense Act of 1916, as amended, 32 U.S.C. 709. These suits were brought under the Federal Tort Claims Act by survivors of two of the Capital passengers seeking to impose liability upon the United States because of McCoy's negligence. A finding of liability in the district court, 200 F. Supp. 475, was reversed by the court of appeals, 329 F. 2d 722.

In this Court the United States does not challenge the finding of the district court that McCoy's negligence was responsible for the accident. The issue here, as in the court of appeals, is whether, assuming McCoy to have been negligent, he was, under the Tort Claims Act, an "employee" of the United States "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of" Maryland. The relevant facts, therefore, principally concern (1) the extent of the supervision and control exercised by the federal government over National Guard officers and caretakers in general, and (2) the particular duties performed by pilot McCoy at the time of the accident. They may be briefly summarized as follows:

Julius R. McCoy held a commission from the Governor of Maryland as a Captain in the Air National Guard of Maryland (R. 92, 660). A rated pilot on flying status, he was assigned as a jet fighter pilot to the 104th Fighter-Interceptor Squadron of the Guard, stationed at Martin Field, near Baltimore (R. 37, 661). He served in that capacity as aircraft maintenance officer of the squadron (R. 38). At no relevant time was that squadron in active federal service (R. 283).

Captain McCoy was also employed as a civilian air technician with the title of Aircraft Maintenance Chief and Acting Maintenance Supervisor. In this position he was responsible for the proper maintenance of the 28 airplanes owned by the United

States which were assigned to the 104th Squadron, and had authority over the 60 to 65 employees who were engaged in the maintenance and care of the 28 airplanes (R. 681). Although the Air Maintenance Chief was not required to be a rated pilot on flying status (nor was such a qualification listed as "desirable" [ANGM 40–41, p. 107; R. 118, 218]), Captain McCoy had performed functional flight tests or flight checks after major maintenance work on airplanes assigned to his unit (R. 70–71).

As a pilot member of the National Guard, Captain McCoy was required to fly 100 hours annually to maintain proficiency (R. 161–162, 300–301). Although that requirement was a federal one, the times, routes and methods of performing such flights were controlled by State officers acting under authority delegated from the governors (R. 283–285, 337–338). Proficiency flights of the 104th Squadron were often made separately from the organized drills (which were on alternate Saturdays), both by those officers who were air technicians and by other pilots of the unit (R. 68). Although air technicians were on civilian pay status during their regular working week, if they flew proficiency flights at such times they received flight pay in their military capacity (and none in their civilian capacity), unless they had already qualified for all the flight pay they were entitled to receive for the period (R. 153–154). Should a pilot fly after he had already qualified for all of his flight pay, he was, when flying, considered to be on military duty training status without military pay, although he was permitted to receive civilian pay for

the period of the flight (R. 127, 155, 156). Only officers of the Air National Guard and other military personnel were permitted to fly airplanes assigned to it and they were authorized to fly only on valid military orders (R. 304). The commanding officer and pilots of the 104th Squadron, and a ranking officer of the Air National Guard, understood that when an officer pilot who was also a civilian air technician flew a National Guard airplane, he did so in his military capacity (R. 332, 117–118, 147, 149).[1]

The flight which resulted in the accident involved in the present case came about as follows. Captain McCoy had requested permission from his commanding officer, Lt. Col. Kilkowski,[2] to take an acquaintance, Donald Chalmers, as a passenger on a flight, with a view to increasing his interest in joining the Maryland Air National Guard (R. 68, 83, 139). The day of the crash, May 20, Col. Kilkowski authorized Captain McCoy to make such a flight with Chalmers

[1] Captain McCoy's testimony is illustrative. When asked what functions he performed "[d]uring proficiency flight as a maintenance chief" air technician, he replied, "I would not be on a flight in duty as a maintenance chief. I would be on the flight in my duty as a captain in the Air National Guard * * *" (R. 117).

[2] Petitioners' assertion that McCoy took his orders in his military status from Major Scott (Pet. Brief, p. 16) is inaccurate. He concededly took his orders in that capacity from the commanding officer of the 104th Squadron, and it is clear from the record that Col. Kilkowski was the commanding officer of the squadron at all times material to this case, as well as Base Detachment Commander in charge of air technicians on the base (R. 122, 578–579, 594; compare R. 42). As Base Detachment Commander, as well as commanding officer of the squadron, he received orders from and was responsible to the Adjutant General of Maryland (R. 145).

(R. 139, 151). The flight order was issued by authority of the commanding officer of the 104th Fighter Squadron. It directed Captain McCoy to make a proficiency or training flight and specified the date of departure, the airplane to be used, and the destination (R. 209, 108, 150–151, 586–587, 161–162; see R. 207).[3] Because of the passenger, the flight was made in one of the unit's two training airplanes, rather than in a fighter (*ibid.*).

Captain McCoy had already qualified for all of the military flight pay which he was entitled to receive for the pay period in question. Since the flight occurred during a day in which he was employed as an air technician, he drew compensation during the period of the flight in his civilian capacity as an air technician (R. 599).[4] Accordingly, he flew the airplane on military training duty status, without mili-

[3] Petitioners' assertion that the flight "was not a training mission" (Pet. Brief, p. 17) is incorrect, as shown above. The pages of the record cited by petitioners for that statement insofar as they relate to the subject at all (R. 136, 152–153, 586–587) support only the proposition that the flight was not "a flying training period * * * for military pay purposes" (R. 136). The evidence of record discloses that a "flying training period" is a paykeeping term (R. 154), and as we have shown above, the flight here would have been such a period for pay purposes except for the fact that Captain McCoy had qualified for the maximum number of flight pay periods for the period of time in question (R. 154–155).

[4] Pilots who are air technicians receive flight pay in their military, rather than their civilian, capacity for any proficiency flights they undertake, even during their regular civilian working hours, unless they have already received the maximum amount of flight pay for the period (R. 153–155; see pp. 4–5, *supra*).

tary pay (R. 127, 155; p. 45, *supra*). The flight had no specific maintenance function or purpose (R. 163) and no check flight or other maintenance flight would have been authorized with a passenger aboard (R. 164). As a maintenance officer, however, Captain McCoy observed matters such as the quality of the performance of the aircraft and its instruments, and the air strips as "a secondary portion of any flight" (R. 163–164).

Before the present actions were begun, similar actions (the "*Meyer* cases") had been brought against the United States on the same theory in the United States District Court for the District of Columbia by Capital Airlines and the survivors of the pilot and copilot of the Capital airplane.[5] That court found that at the time of the accident "Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor" (R. 687). The court ruled as a matter of law that a "person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act" (R. 688).

By agreement of the parties, the record made in the *Meyer* cases on the issue of the responsibility of the United States for the conduct of Captain McCoy was filed in these cases. Petitioners did not, however, assert that the rulings or judgment in the *Meyer* cases were binding upon the government under principles of res judicata or collateral estoppel. The district

[5] Actions arising out of the same collision have also been filed in Illinois, Ohio and New York.

court in these cases did not consider the judgment in the *Meyer* cases to be binding, nor did it refer to that judgment expressly in holding the United States liable.

The United States appealed to the Court of Appeals for the Third Circuit from the judgments in these cases and to the Court of Appeals for the District of Columbia Circuit from the judgments in the *Meyer* cases. The Court of Appeals for the District of Columbia Circuit rendered its decision first and affirmed on the issue of liability, holding that Captain McCoy was an employee of the United States, and that the very existence of an employer-employee relationship gave the United States the right to control his activities "in an ultimate sense." *United States* v. *State of Maryland, for the Use of Meyer,* 322 F. 2d 1009. A timely petition for certiorari from that decision was denied on December 16, 1963, 375 U.S. 954, but the case is presently pending upon the government's motion for leave to file petition for rehearing, No. 543, O.T. 1963.

The Court of Appeals for the Third Circuit, Judge Staley dissenting, reversed the judgments of the district court in the present cases (R. 708–732). Judge Smith's opinion held that civilian employees of the National Guard are not employees of the federal government within the meaning of the Tort Claims Act, since they, like the Guard's military employees, are subject to the supervision and direction of State officials who are, in turn, responsible to the directions of State governors (R. 714–721).

Alternatively, Judge Smith held that Captain McCoy was flying the airplane "within his line of duty as a member of the Guard," and was acting at that time, "under the control and supervision of the authorized military personnel of the Maryland Air National Guard." Consequently, the United States would not be liable for Captain McCoy's conduct under the Maryland doctrine of *respondeat superior* since that doctrine applies only if the employer directs and controls the employee with respect to the very activity from which the injury arises (R. 721–722, 723).[6] In a concurring opinion, Judge Hastie agreed that the "basic character" of the flight in question was that of a training flight "undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard," but did not reach the question whether civilian employees are to be treated differently from military employees of the National Guard (R. 725). Judge Staley dissented primarily upon the

[6] The opinion of the court noted that less than usual weight should be given to the findings of the district court in this case because the district court record consisted of the record made in the District of Columbia which, in turn, consisted primarily of depositions and written exhibits (R. 709–710). The court did not, however, find it necessary to set aside any specific district court finding. We believe that the factual analysis made by the court of appeals is consistent with the basic findings made by the District Court for the District of Columbia in the *Meyer* cases and with those of the district court in these cases, except insofar as the district court in these cases implied that Captain McCoy was flying the airplane exclusively or primarily as an air technician. Insofar as they so implied, they were inconsistent with the findings of the district court and the ruling of the court of appeals in *Meyer*, and were clearly erroneous.

reasoning of the Court of Appeals for the District of Columbia Circuit in the *Meyer* cases (R. 726–730). Petitioners' timely petition for rehearing *en banc* was denied by a vote of six-to-one (R. 733).

SUMMARY OF ARGUMENT

The United States may be held liable under the Federal Tort Claims Act for the negligence of Captain McCoy only if he was an "employee of the Government" and if his conduct in that capacity was such as to impose liability under State law upon a private employer in the United States' position. We contend that Captain McCoy was not, under the applicable principles of agency law, an employee of the United States in his capacities as a military member and civilian technician of the Maryland National Guard. Alternatively, even if he was an employee of the federal government for some purposes, he was not subject to any federal direction or control or engaged in any function of the federal government while performing the flight which gave rise to petitioners' claims.

1. Article I, Section 8 of the Constitution reserves to the States the right to appoint officers and to train the "Militia." The Army and Air Force National Guard are nothing more than the "Militia" referred to in that clause. The National Guard as we know it today is a State-controlled and State-operated militia which is subsidized, in large part, by federal funds and which may be called into federal service by the President. As a condition of such federal subsidies, the governing statute authorizes the establishment of federal standards which must be met by the State agencies, but the actual supervision and

direction of each State's Guard units remain with State officials. The ranking officers are the adjutants general of the States, and they are responsible only to the State governors. Consequently, the relationship between the United States and the Guard of each State, like the relationship between the federal government and a host of other State agencies performing local functions with the assistance of federal funds, is essentially that of a party and an independent contractor. Just as the employees of independent contractors who deal with the United States are not employees of the government for Tort Claims Act purposes, so, too, members of the National Guard are outside the coverage of the Tort Claims Act. In providing an administrative and legislative remedy in 1960 for injuries caused by the negligent act of all Guard personnel, Congress approved the court decisions which had held that military Guard personnel were State and not federal employees because they were under the "command and control" of State authorities.

There is a line of court of appeals' decisions (which we challenge) holding that civilian Guard personnel are employees of the United States for purposes of vicarious tort liability. However, the history of the statute authorizing payment from federal funds for such employees, as well as the regulations issued thereunder, the actual administrative understanding and practice, and other Congressional legislation all indicate that Congress considered civilian personnel as State employees and that they are actually as much under State "command and control" as military

Guard members. Indeed, by including civilian personnel among those for whose negligence an administrative remedy was supplied in 1960, Congress demonstrated that civilian and military personnel of the Guard should be treated alike and that no remedy under the Tort Claims Act should be available for the conduct of such employees.

2. Alternatively, even if Captain McCoy was an employee of the United States in his capacity as a civilian technician of the Guard, he was employed by the State of Maryland insofar as he performed military duties. Hence he was at most a "shared" or "borrowed" servant. The flight which produced the accident on which these claims are based was a military flight because only military personnel were authorized to make it and because it was done under military orders. Only the State of Maryland could direct the pilot when, where and how to fly; hence only the State of Maryland could be held liable—under that State's law of *respondeat superior*—for conduct negligently performed while it had the power to control such conduct. The incidental civilian technician functions performed by Captain McCoy while in the air did not detract from the primary capacity in which the flight was made, and, in any event, even the civilian duties were carried out under the direction and control of the State.

3. Finally, there is no merit to petitioners' claims that they are entitled to prevail because other litigants suing in the District of Columbia for damages aris-

ing out of this accident obtained final judgments against the United States in their cases. This claim was not timely asserted. Moreover, the novel doctrine of collateral estoppel which petitioners now raise would produce patently unfair results and should be rejected.

ARGUMENT

This case concerns the liability of the United States, under the Federal Tort Claims Act and the doctrine of *respondeat superior*, for the conduct of Captain Julius R. McCoy, a pilot who was, at the same time, a commissioned officer and a civilian employee of the Maryland Air National Guard. Because of a consistent line of decisions in the courts of appeals which have distinguished, for Tort Claims Act purposes, between military and civilian employees of the National Guard and have held only the latter to be employees of the United States for purposes of that Act, the district court in this case—as in *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d 1009 (C.A. D.C.), pending as No. 543, O.T. 1963 (which arose out of the same mid-air collision)—believed it essential to determine whether Captain McCoy was acting in a civilian or military capacity at the time of the collision. The majority of the court of appeals ruled that McCoy was acting primarily in his military capacity and was acting under the exclusive control and direction of State officials (R. 723–724, 725).

We contend first that the decisions holding the United States liable for acts committed by civilian employees of the Guard are in error, and that the

distinction drawn between these cases and those involving military personnel is, as Judge Smith observed below, "untenable" (R. 716). (In using the term "*Guard*" throughout the brief, we refer to units of the National Guard not in active federal service.) Consequently, it is immaterial whether Captain McCoy was engaged in civilian or military duties while piloting the trainer plane involved in this collision. In either event, his negligence is not attributable to the United States. For, as in his military capacity, McCoy as a civilian was under the direction and control of the State of Maryland at the time of the collision and was not, therefore, an "employee of the Government" within the meaning of the Tort Claims Act.

Alternatively, we submit that the court of appeals was correct in ruling that Captain McCoy was engaged primarily in military duties when he was flying the jet trainer airplane, and was under the exclusive direction and supervision of State officials. Accordingly, even if he was an employee of the United States for purposes of the Tort Claims Act because of his civilian duties, no federal official had the right to direct him to fly or to control him in the performance of his flight. Since, under Maryland law, the employer who has the right to control the particular activity which results in the accident is the only one who may be held liable under the doctrine of *respondeat superior*, and since the State and not the federal government directed the pilot's military activities, liability for the pilot's negligence in this case cannot attach to the United States.

I

THE UNITED STATES IS NOT LIABLE FOR THE PILOT'S NEGLIGENCE BECAUSE CIVILIAN GUARD PERSONNEL ARE NOT "EMPLOYEES OF THE GOVERNMENT" WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

Under the Federal Tort Claims Act, 28 U.S.C. 1346 (b) (pp. 61–62, *infra*), the United States has assumed liability for negligent acts or omissions of any "employee of the Government" who is "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." In applying this statute to military personnel of the National Guard, the federal courts have uniformly held that so long as such personnel are not in active federal service and therefore are not under the immediate direction of federal officials, they are to be considered employees of the States rather than employees of the United States. *Williams v. United States,* 189 F. 2d 607 (C.A. 10); *Dover* v. *United States,* 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States,* 199 F. 2d 581 (C.A. 5); *Storer Broadcasting Co.* v. *United States,* 251 F. 2d 268 (C.A. 5), certiorari denied, 356 U.S. 951; *Bristow* v. *United States,* 309 F. 2d 465 (C.A. 6); *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911; *Blackwell* v. *United States,* 321 F. 2d 96 (C.A. 5); *Mackay* v. *United States,* 88 F. Supp. 696 (D. Conn.); *Glasgow* v. *United States,* 95 F. Supp. 213 (N.D. Ala.); *Satcher* v. *United States,* 101 F. Supp. 919 (W.D. S.C.); *Larkin* v. *United*

States, 118 F. Supp. 435 (N.D. N.Y.); *Gross* v. *United States,* 177 F. Supp. 766 (E.D. N.Y.).[7]

In this respect the courts have distinguished between military and civilian personnel of the Guard. Civilian employees, who receive compensation from federal funds pursuant to 32 U.S.C. 709(f), have been held to be federal employees for Tort Claims Act purposes. *United States* v. *Holly,* 192 F. 2d 221 (C.A. 10); *Elmo* v. *United States,* 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan,* 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States,* 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt,* 242 F. 2d 854 (C.A. 9); cf. *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911. We believe, for the reasons stated below, that this distinction is unsound, and that the general structure of the National Guard, the legislative history of the caretaker provision, subsequent Congressional enactments and the actual administrative practice and interpretation all establish that civilian employees of the Guard, like military personnel, are not employees of the United States for purposes of vicarious tort liability.

A. THE GUARD IS BASICALLY A STATE-CONTROLLED AND STATE-OPERATED MILITIA

The unbroken line of decisions which have held that non-civilian members of Guard units are not employees

[7] *O'Toole* v. *United States,* 206 F. 2d 912 (C.A. 3), was a case in which members of the National Guard of the District of Columbia were held to be federal employees, because that organization is under the direct command of the President, who appoints its officers and who, through a direct chain of command, controls its activities.

of the United States (pp. 15–16, *supra*) rests upon ordinary principles of agency law which have been approved and considered applicable to this situation in the course of Congress' consideration of the problem. The common-law principle of vicarious tort liability upon which are based the United States' obligations under the Tort Claims Act is rooted in the employer's right to control his employees' activities. *E.g., Restatement, Agency 2d,* § 219, comment a. Liability for tort under the doctrine of *respondeat superior* is premised upon the employer's right to control and supervise the manner in which his employees' duties are to be performed as well as to direct the ultimate result to be achieved. *Id.,* § 220 (1); *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518. The history of the National Guard, its present function, and its organizational structure demonstrate that although the Guard is supported in large part by federal funds, it is administered, controlled and supervised by the States. Hence, under the applicable master-servant principles, its employees' negligent conduct may be attributed to the States but not to the federal government.

1. The Army National Guard and Air Force National Guard are the "Militia" authorized by Article I, Section 8, of the Constitution"[8]

> The Congress shall have Power * * *
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[8] 32 U.S.C. 101(4), (6). (p. 63, *infra*).

> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *

In first exercising the militia power, Congress prescribed only the organization and discipline of the militia, but it subsequently supplied arms and equipment. Since the beginning of this century, when the term "National Guard" came into use, Congress has also provided funds for the compensation of militia members and civilian employees.[9a] The basic structure of the National Guard as it is known today was formulated by the National Defense Act of 1916, now 32 U.S.C. 101, *et seq.*

The 1916 enactment first embodied Congress' fundamental decision to use the organized State militia as a basic source of reserve military strength for the nation in place of a standing regular army or national force of volunteer reserves. H. Rep. No. 297, 64th Cong., 1st Sess. (1916), pp. 2–9, 14; see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 196–203 (1940). Congress not only provided for the arming, organization and discipline of the National Guard, but authorized the use of federal funds for the compensation of its officers if members of the

[9a] There were, of course, civilian employees of the militia long before Congress authorized the use of federal funds for their pay. *E.g.*, Act of Maryland General Assembly, 1678, 7 Archives of Maryland (Md. Hist. Society 1889) 59; Maryland Rev. Code of 1878, Art. 18, §§ 28–33.

Guard units and their officers met federally prescribed standards.[9]

The 1916 act contemplated that the National Guard would be (1) a State militia under the command and direction of the State except when called into federal service, and (2) a reserve component of the national forces which, when ordered into active federal service, would constitute an integral part of the Army of the United States. The Act made it perfectly clear that the States are to retain command and control over the National Guard when it is not in active federal service.[10] The basic features of the National Guard and its relationship to the State and national governments have remained substantially the same as prescribed by the National Defense Act of 1916.

Guard units qualify for federal support under the Act only if they maintain "federal recognition" by participating in federally prescribed drills and training and by passing inspections designed to assure that their members, organizations, training, instruction and property meet prescribed federal standards. 32 U.S.C. 105, 108, 502. Equipment and supplies assigned to the Guard remain the property of the United States, but the States have the responsibility for their maintenance and care. 32 U.S.C. 105(a)(1), 702, 710(c); R. 287–288. Both the Constitution and the

[9] See, *e.g.*, 53 Cong. Rec. 4356.

[10] See, *e.g.*, Section 61, now 32 U.S.C. 109(b), *infra*, p. 65. The Act, as described by one of its supporters, "allows the State to retain control of its organization while the Government aids in preparing it in efficiency." 53 Cong. Rec. 4356. One of its opponents remarked that, under the proposed legislation, "the State governors shall continue to command these 48 little armies while the Nation pays a big share of the bill." 53 Cong. Rec. 4341.

governing statute provide that the selection and recruitment of Guard personnel and the direct supervision of their training and activities are reserved to the States and to State officials, except for those parts of the militia "employed in the Service of the United States." Constitution, Art. I, Sec. 8, Cl. 16; 32 U.S.C. 101(4) and (6), 501; R. 290.

In actual practice, therefore, State officials have the right to select and hire Guard personnel, to promote and discharge them, to determine the amount of pay and retirement and disability benefits for civilian employees, and to supervise and direct the activities of all Guard personnel.

The ranking officer of each State Guard is usually called the adjutant general, who is a State official appointed under State law. *E.g.*, Md. Code, Art. 65, §§ 9–10, p. 71, *infra*; see *Hyde* v. *United States*, 139 F. Supp. 752 (Ct. Cl.). While the office of adjutant general of the State militia has been prescribed by federal statute since 1792,[11] the statute itself makes clear that the office is a State office, with almost exclusively State duties. 32 U.S.C. 314, pp. 65–66, *infra*. In its present form it provides that "There shall be an adjutant general in each State * * * [who] shall perfrom the duties prescribed by the laws of that jurisdiction." 32 U.S.C. 314(a), p. 65, *infra*.[12] The statute provides that the President shall appoint the adjutant general of each territory and of the District of Columbia, thereby implying that each State is to provide its own

[11] Act of May 8, 1792, 1 Stat. 271.

[12] Originally, the statute provided that it would be his duty "to distribute all orders from the commander-in-chief of the State to the several corps." 1 Stat. 271, 273.

officer to fill the post. 32 U.S.C. 314 (b), (c). The only federal duty imposed upon the adjutants general is to make returns and reports to the Secretaries, which are, in turn, to be made available to Congress. 32 U.S.C. 314(d). In most States, the adjutant general is the advisor to the governor on matters pertaining to the Guard (R. 294), and in many instances the adjutant general is an officer who is not federally recognized and who receives pay exclusively from the State (R. 288–291).

The laws of Maryland illustrate the duties of the adjutants general and their relationship to the governor. The office of adjutant general may be filled in Maryland only by appointment of the governor with advice and consent of the State Senate (Md. Code, Art. 65, § 9). The governor, who is commander-in-chief of the militia (Const. Art. II; Md. Code, Art. 65, § 6), may appoint the adjutant general to be chief of staff (*id.* § 9) or ranking line officer (*id.* § 10), in which capacity he would be "in control of the Military Department of the State, and subordinate only to the Governor in matters pertaining to said department." *Ibid.* Thus, in Maryland, as elsewhere, the adjutant general is subordinate only to the governor of the State, and not to any federal official. And since the governor has the ultimate responsibility for the supervision, direction and control of Guard members in his State, such military personnel cannot be considered employees of the federal government for Tort Claims Act purposes. See *Harris* v. *Boreham;* 223 F. 2d 110 (C.A. 3); *Lavitt* v. *United States,* 177 F. 2d 627 (C.A. 2).

2. The fact that the federal government prescribes conditions for federal support does not mean that Guard personnel are employees of the United States for Tort Claims Act purposes. For the federal government carries out many of its objectives by means of arrangements with independent contractors whereby not only the object to be attained and the work to be done is prescribed but stringent standards and detailed specifications are also enumerated. Notwithstanding such indirect governmental "control" over a contractor's employees, the Tort Claims Act excludes independent contractors from the definition of "employee[s] of the government." 28 U.S.C. 2671, p. 62, *infra; Strangi* v. *United States,* 211 F. 2d 305, 308 (C.A. 5); see *United States* v. *Silk,* 331 U.S. 704, 712.

State employees under federally subsidized programs such as the Guard are analogous to employees of independent contractors under cost-reimbursable contracts. In both situations the federal government furnishes the funds, prescribes the objectives, fixes standards and specifications, and retains the right of inspection. But both States and independent contractors administer their programs on a day-to-day basis, and retain the rights to supervise and direct their employees, to give work assignments, to fix working conditions, and to select, promote and discharge the employees.

There are a host of programs in which the federal government supplies all or most of the funds, but which are administered by the States in accordance

with federal standards.[13] As Judge Smith noted below, the Guard is a "classic" example of a program "in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder" (R. 720). The fact that a State employee's

[13] 1. Agricultural research.
2. Cooperative agricultural extension work.
3. Agricultural marketing services.
4. Donations of surplus agricultural commodities.
5. Resident instruction at land-grant colleges.
6. Airport construction.
7. Highways.
8. Civil defense equipment and supplies.
9. Natural disaster relief.
10. School lunches.
11. School construction in federally affected areas.
12. School operation and maintenance in federally affected areas.
13. Vocational education.
14. Public health services.
15. Construction of health facilities.
16. Crippled children's services.
17. Maternal and child health services.
18. Poliomyelitis vaccination.
19. Public assistance.
20. Child welfare services.
21. Vocational rehabilitation.
22. Employment security.
23. Low-rent public housing.
24. Slum clearance and urban renewal.
25. Fish and wildlife restoration and management.
26. State and private forestry cooperation.

See *Report of the Commission on Intergovernmental Relations*, 84th Cong., 1st Sess., H. Doc. 198, June 28, 1955, p. 301; *A Description of Twenty-five Federal Grant-in-Aid Programs*, a report submitted to the Commission on Intergovernmental Relations, June 1955, p. 178.

income is derived from federal funds should not make him an employee of the United States for purposes of vicarious liability under the Tort Claims Act.

3. In rejecting a bill to extend the coverage of the Tort Claims Act to Guard personnel, Congress, in 1960, approved the decisions which had held that the United States was not vicariously liable for the negligent conduct of Guard employees. The Senate Report which accompanied a substitute proposal to provide an administrative procedure for the settlement of tort claims arising out of Guard activities observed that "members of the National Guard not in active Federal service have been held not to be employees of the United States within the meaning of the Federal Tort Claims Act * * *." S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 3. The committee explained that "[t]he crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. The training of its members is primarily that of the State, except, of course, when the National Guard is federalized or called into Federal service." *Id.* at p. 4. The House Committee also observed that "it is not appropriate to grant judicial relief against the United States under the Federal Tort Claims Act" in this situation because "Federal authorities do not have command and control over National Guard units and members not in active Federal Service." H. Rep. No. 1928, 86th Cong., 2d Sess. (1960), p. 4; see Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and H.R. 9315 (1960). Hence Congress ratified the previous understanding

of the courts that military personnel of the Guard were not covered by the Tort Claims Act.

Indeed, the terms of the Tort Claims Act itself demonstrate that Guard members are excluded from its scope. That statute defines "employee of the government" to include "officers and employees of any Federal agency, members of the military or naval forces of the United States" and others "in the Service of the United States." 28 U.S.C. 2671. At the time of the passage of the Tort Claims Act, Section 58 of the National Defense Act, as amended, provided that members of the National Guard "shall not be in the active service of the United States except when ordered thereto" and that they were otherwise to be administered, armed and trained in their status as the National Guard of the various States." Since the present 10 U.S.C. 3078 expressly makes the Army National Guard a "component of the Army" only "while in the service of the United States,"[14] it seems clear that Guard members are not "members of the military or naval forces of the United States" or otherwise "in the service of the United States." The clarity of the statutory language, as well as Congress' adoption of the rule applied consistently in the federal courts before 1960, bars any claim (see Pet. Br. 56–58) that military personnel of the Guard are "employees of the government" for Tort Claims Act purposes.

[14] These provisions, formerly 32 U.S.C. 4, now appear in somewhat revised form in 10 U.S.C. 3495, 3079, 8495 and 8079.

B. CIVILIAN PERSONNEL OF GUARD UNITS ARE UNDER THE CONTROL AND DIRECTION OF THE STATE AND WERE REGARDED BY CONGRESS AS STATE EMPLOYEES

In his civilian capacity, Captain McCoy was employed to supervise the maintenance and care of 28 airplanes which were owned by the United States and had been assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard (R. 681). Pay from federal funds for employment in this capacity was authorized by 32 U.S.C. 709, which was originally enacted as Section 90 of the National Defense Act of 1916 and which has come to be known as the "caretaker" statute. A line of decisions beginning with *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10) has held that Guard personnel employed under this statute, unlike military personnel, are employees of the United States for Tort Claims Act purposes. See cases cited at p. 16, *supra*. We believe that this distinction is unsound, and that Guard personnel—whether military or civilian—are, like other State employees, outside the coverage of the Tort Claims Act. Consequently, even if Captain McCoy had been acting solely in a civilian capacity during the flight involved in this case, his negligence would not be attributable to the United States.

(1) *The statute and regulations.*—In its present form, the "caretaker" statute authorizes the Secretary of the Army (for the Army National Guard) or the Secretary of the Air Force (for the Air Force National Guard) to spend funds allotted for the Guard "for the compensation of competent persons to care for material, armament, and equipment" of the Guard, and to perform "clerical" and "other duties." 32

U.S.C. 709(a), pp. 66–67, *infra*. Commissioned officers as well as enlisted men may be so employed (32 U.S.C. 709(d), p. 67, *infra*) and the Secretaries are authorized to "fix the salaries" of such employees, and to "designate the person to employ them." 32 U.S.C. 709(f), pp. 67–68, *infra*. Captain McCoy received pay under this statute as an air technician (R. 681).

The regulations promulgated by the Secretaries pursuant to the caretaker statute designate the adjutants general of the States as the persons authorized to employ personnel under the statute. NGR 51, par. 3; ANGR 40–01, par. 3b, pp. 73–74, *infra*. The regulations refer to the employees so hired as "civilian personnel" of the Guard. See ANGR 40–01, par. 5a; NGR 51, par. 4b. They are utilized in the administration, supply, operations, training, and maintenance of the Guard. ANGR 40–01, par. 2a. The authority to supervise and to discharge such employees, to fix their rates of pay and to establish work hours is placed in the State adjutants general, and State officials also determine promotions, grade and status for the individual employees. NGR 51, par. 3; ANGR 40–01, par. 3b. Federal officers have no command authority or control over these employees and no federal officers or agencies have authority to promote or discharge them, to give them orders, or to control or supervise or assign their daily work (R. 295–296). Civilian personnel of the Guard hired under the caretaker statute are not covered by the federal civil service statutes or the Federal Civil Service Retirement System. The regulations declare these civilian employees of the Air National Guard "to be employees of the State." ANGR, par. 4; see also par. 5a, 21a. Accord NGR 51, par. 4b.

With minor exceptions, the regulations provide that the civilian personnel of the Guard hired under the caretaker statute are to be selected from members of the National Guard of the State. They are to occupy the military table of organization position most comparable to their civilian position so that they will perform duties in their civilian employment which they would be required to perform in their military status if mobilized and ordered into active service. NGR 51, par. 5a and 5e; ANGR 40–01, Sec. 1, par. 2b and 2c. These civilian personnel constitute approximately 19 percent of the total personnel of the Air National Guard and are generally "key personnel" (R. 292–293). A majority of them are enlisted men, but officers hold positions as base commanders, training supervisors, and supply and maintenance officers (R. 293).

(2) *History of the statute.*—The caretaker provision was initially adopted as a part of the plan to provide federal funds for the equipment and compensation of the Guard when, in the National Defense Act of 1916, it was determined to set federally prescribed standards for the State militia and to use it in place of a federal reserve force. Section 90 of the 1916 Act provided (39 Stat. 205–206):

> Funds allotted by the Secretary of War for the support of the National Guard shall be available * * * for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each battery or troop, shall be duly en-

> listed therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia.

It appears from this initial enactment that the caretaker statute contemplated the use of federal funds for the compensation of enlisted members of units of the Guard, who were to be selected ("detailed") by the commanding officer of each unit for full-time employment in caring for the unit's equipment. While providing for the expenditure of federal funds under federal regulations, the statute prescribed that the persons receiving them were to be members of the State militia selected by a State official (the commanding officer) to perform a State function (the maintenance and care of the unit's equipment, Secs. 82–89, 39 Stat. 203–205, now found at 32 U.S.C. 105(a), 702 (a), (d), 710(e)). As originally drafted, therefore, Section 90 clearly related only to employees of the State. That was the ruling of those administering the Act when it was new. 27 Comp. Dec. 344, 345 (1920).

Section 90 was amended several times in the two decades following its enactment to increase the number of caretakers and their functions,[15] but the basic

[15] Act of June 4, 1920, ch. 227, subch. I, § 46, 41 Stat. 783; Act of March 1, 1922, ch. 90, 42 Stat. 401; Act of June 6, 1924, ch. 275, § 5, 43 Stat. 471; Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673–674; Act of April 21, 1928, ch. 397, 45 Stat. 440; Act of June 19, 1935, ch. 277, 49 Stat. 392; Act of October 14, 1940, ch. 875, § 1, 54 Stat. 1134. The provisions were revised and codified by the Act of August 10, 1956, ch. 1041, § 2, 70A Stat. 614.

relationships established by the statute remain unchanged. Two of the amendments are pertinent to the problem presented here. In 1926 Congress authorized, for the first time, the compensation of Guard officers for full-time civilian employment. Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673, 32 U.S.C. 709(d). The authorization was limited to air squadrons, and to one officer per squadron. The purposes of the amendments were to secure the more efficient maintenance and care of airplanes, and to provide "an officer constantly on duty * * * for the supervision of flying training." H. Rep. No. 1031, 69th Cong., 1st Sess., p. 3; S. Rep. No. 785, 69th Cong., 1st Sess., p. 1. Thus, the first officers of the Guard to occupy a civilian or air technician status were to perform in that capacity a function (conduct of training) reserved to the States by the Constitution (Art. I, Sec. 8, cl. 16) and by statute (Section 91 of the National Defense Act of 1916, 39 Stat. 206, now 32 U.S.C. 501(b)). Nothing in the statute or legislative history indicates that Congress intended this State function to be performed by a federal employee. It is, therefore, most reasonable to assume that in 1926, as in 1916, Congress considered the members of the Guard "detailed" for caretaker employment by their organization commander to be full-time civilian employees of the State, and not agents of the federal government.

The second relevant amendment dealt with the statutory provision that the "caretakers" were to be "detailed" by the commander of the organization having custody of the equipment. In 1935, at the

request of the National Guard Association and the adjutants general of the States, Congress authorized the pooling of caretakers by providing that the Secretary designate "by whom they shall be employed." Act of June 19, 1935, ch. 277, 49 Stat. 391, 392. The legislative history of this amendment shows that Congress intended to allow the Secretary to designate only State officials to employ the caretakers. The Senate committee report makes this intention clear (S. Rep. No. 635, 74th Cong., 1st Sess. (1935), pp. 2–3) (emphasis added):

> Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law *States* are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper *State official* of the caretakers as a pool. * * *

Nothing in the history of the amendment supports the inference (erroneously drawn by the Tenth Circuit in *United States* v. *Holly*, 192 F. 2d 221) that the Secretary was thereby empowered to choose caretakers himself or to designate a federal official to engage in the selection of caretakers. And the practice has consistently been for the appropriate Secretary to designate the adjutant general or some other State official to perform this function. *E.g.*, NGR 79, dated January 4, 1936, par. 1.

(3) *Administrative practice and interpretation.*—The actual facts involving the exercise of the authority granted by 32 U.S.C. 709 to engage full-time civilian employees demonstrate that these employees are, for all practical purposes, under the control and

supervision of the State. It should first be noted that the full-time civilian employees of the Air National Guard constitute almost one-fifth of its total personnel, and that they are utilized for the day-to-day "administration, supply, operations, training and maintenance" of the Guard. ANGR 40–01, par. 2a; NGR 51, par. 4b; R. 293. The caretakers are characterized as the "key personnel" of the Guard, and they have been authoritatively described as its "backbone." [16] They are on duty in their civilian capacity for a 40-hour work week, whereas the military members of the Guard meet only for 8 or 16 hours a month, and for a fifteen-day summer training period.[17] Consequently, caretakers are the only active personnel of the Guard for the greater part of every year.

The National Defense Act was intended to allow "the State to retain control" of the Guard organization. 53 Cong. Rec. 4356. Later Congressional enactments were designed to maintain that relationship. *E.g.*, S. Rep. No. 1795, 82d Cong., 2d Sess., p. 11.[18] If civilian employees of the Guard are to be considered

[16] Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess., (1957) vol. 4, p. 1303.

[17] Sec. 92, 32 U.S.C. 502. Most Air National Guard units meet for two days a month. The Maryland 104th Fighter Squadron, for example, met on alternate Saturdays (R. 695).

[18] The retention of State control over some of the nation's armed forces has been one of the principal considerations in favor of retaining the Guard in its present form, rather than federalizing it. See Proceedings of 1944 Governors' Conference, 91 Cong. Rec. App. 1006–1008; see also State memorials against federalizing the National Guard. 95 Cong. Rec. 1323, 1764, 2215, 2976–2977, 3434–3435, 4906, 5015, 5090, 5288, 7215, 7468–7469, 7565–7566; cf. 95 Cong. Rec. 7209–7211.

employees of the federal government, as petitioners contend, the federal government would be in control of the Guard of every State for much the greater portion of every year. Such a reading of Section 90 of the National Defense Act would be inconsistent with the dominant Congressional intent underlying that Act.

The Congressional desire to retain civilian Guard personnel as State employees is also demonstrated by the fact that caretakers are deemed to be State employees for Social Security purposes [19] and for purposes of the payroll deductions for State retirement funds,[20] and for purposes of the laws administered by the Civil Service Commission.[21] Because they are not within the federal civil service, they are ineligible to receive the disability, death and retirement benefits provided by the Civil Service Retirement System.[22]

[19] 42 U.S.C. 418(b)(5); H. Rep. No. 1698, 83d Cong., 2d Sess., p. 50; S. Rep. No. 1987, 83d Cong, 2d Sess., pp. 45–46.

[20] 5 U.S.C. 84d; S. Rep. No. 2045, 84th Cong., 2d Sess., p. 1; see also 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning federal contribution to State retirement funds); H. Rep. No. 786, S. Rep. No. 709, 87th Cong., 1st Sess.

[21] *Anselmo* v. *Ailes*, 235 F. Supp. 203 (E.D.N.Y.), pending on appeal as C.A. 2, No. 29428. Like other State employees receiving pay in whole or in part from federal funds, however, the Hatch Act does apply to them. 5 U.S.C. 118k, NGR 51, par. 8.

[22] To be sure, the Bureau of Employees' Compensation awards such employees benefits under the Federal Employees' Compensation Act. However, the concept of employment under workmen's compensation acts and other remedial legislation is much broader than the relationship which imposes vicarious liability under common-law agency principles. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 120–122; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 481; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 506–507. For similar reasons, *Layne* v. *United States*,

Nor do the civilian employees of the Guard constitute a clearly separable group of employees which may appropriately be assumed to be subject to some control other than that of the State. Civilian personnel of the Guard receiving pay from federal funds are, with a few minor exceptions, selected from members and officers of the Guard to perform the same functions that they would perform in their military capacity. ANGR 40–01, ¶ 2b; NGR 51, ¶ 5b; R. 296. The federal government sets standards of federal recognition for both military and civilian employees which the Guard units and personnel must meet in order to receive federal support, but the only federal sanction for failure to meet those standards is the withdrawal of federal support for the unit. R. 284, 289–290; 32 U.S.C. 108, 301, 305–307, 323. *State* v. *Industrial Commission*, 186 Wis. 1, 6, 202 N.W. 191, 193. Unless and until the unit is called into federal service, State officials operating under the State adjutants general have the exclusive right to command and control the Guardsmen, both in their military and civilian capacities (R. 312–317; see pp. 19–21, 26, 27, *supra*). In each capacity, the adjutant general and other State officials acting under the supervision and direction of the governor, select from among qualified candidates the person to be enlisted and employed, and they have the exclusive right to supervise and direct

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295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 990, is not in point. Indeed, federal compensation under the Act is awarded to Guardsmen training in summer camp in their military capacity (*In the Matter of Eleanore H. Barr, claiming as widow of 1st Lt. Robert A. Barr, deceased National Guardsman*, 10 ECAB 206), in circumstances where the United States would clearly not be held liable for their conduct under the Tort Claims Act.

activities, and to promote, demote, or discharge the men. R. 295; ANGR 40-01, ¶ 3; NGR 51, ¶ 3. In neither capacity does any federal officer or official have authority to give them orders, to control or supervise or assign their daily work, or to promote or discharge them (R. 295-296).

(4) *Other legislative considerations.*—Those charged with the administration of the caretaker program have, from the time of its enactment, consistently considered civilian personnel of the Guard to be employees of the States, and not employees of the United States. 27 Comp. Dec. 344, 345 (October 12, 1920); 21 Comp. Gen. 305 (1941). This consistent administrative interpretation has been communicated to Congress in various forms, including testimony before appropriations committees. For example, in 1957, the ranking air officer in the National Guard Bureau, General Wilson, described the air technician program as follows (Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess. (1957), vol. 4, p. 1303):

> Our full-time employees which we call air technicians are the backbone of our organization. They serve in a dual capacity; as military members of the Air National Guard and as civilian employees of their respective States.
> * * *

Similarly, in regard to a proposed air technician program for the United States Air Force Reserve, one general testified that it would be "practically a duplication of the Air National Guard's air technician plan" except for "the basic difference" that "the Air National Guard technician is a State employee; but in the Reserve, inasmuch as this is a Federal job, he

would be a civil service employee." *Id.* at pp. 998–999.

Statutes have been passed on the basis of this administrative understanding. In 1954, for example, the Social Security Act was amended so as to provide a separate coverage group for "civilian employees of National Guard units of a State who are employed pursuant to section 90," and to state that for such purpose such employees shall "be deemed to be employees of the State." Act of September 1, 1954, 68 Stat. 1059, amending 42 U.S.C. 418(b)(5). That amendment was expressly based upon the consistent administrative interpretation that civilian personnel of the Guard are employees of the States; both committee reports noted that "[t]he Department of Defense does not regard these employees as Federal employees." H. Rep. No. 1698, 83d Cong., 2d Sess. (1954), p. 50; S. Rep. No. 1987, 83d Cong., 2d Sess. (1954), pp. 45–46.

Perhaps even more indicative of the Congressional understanding is the legislative history of a 1956 statute which authorized federal disbursing officers to make payroll deductions for such employees for State retirement programs. Act of June 15, 1956, 70 Stat. 283, 5 U.S.C. 84d. Although decisions of two courts of appeals holding that such employees were employees of the federal government for purposes of the Tort Claims Act were called to its attention, as well as the probability that that issue might some day be resolved by this Court, Congress adopted the legislation because "[t]hese employees, although paid from Federal funds, are considered to be State rather than Federal employees." S. Rep.

No. 2045, 84th Cong., 2d Sess. (1956), pp. 1, 4–5. See also Pub. L. 86–740, 32 U.S.C. (Supp. II) 715; Pub. L. 87–224, Sept. 13, 1961, 75 Stat. 496, 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning contribution to State retirement funds); H. Rep. No. 786, S. Rep. No. 709, 87th Cong., 1st Sess.

In 1960 Congress adhered to its consistent policy of treating the civilian, as well as military, members of the Guard, as employees of the States. It did so in the very context of the Federal Tort Claims Act. For the bill which it rejected (see pp. 24–25, *supra*) would have extended the coverage of that Act to make the United States responsible for the conduct of civilian, as well as military, personnel of the Guard.[23] In adopting instead the recommendation of the Department of the Army that the federal government meet its moral obligations for the conduct of all Guard personnel, Congress enacted legislation providing a comprehensive administrative and legislative remedy. In effect, the amendment authorized the Secretary of the Air Force or Army to pay claims based upon the conduct of military or civilian personnel of the Guard up to an amount of $5,000, and to certify claims in excess of that amount to Congress for payment. Pub. L. 86–740, 32 U.S.C. (Supp. II) 715(a), 715(d), pp. 69–70, *infra*).

The legislative history of the bill makes it clear that Congress deliberately chose to make the new amendment applicable to "civilian employees of the National Guard." H. Rep. No. 1928, 86th Cong., 2d Sess.

[23] Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess., p. 12.

(1960), p. 4. And the Congressional reasoning—that liability under the Tort Claims Act would be inappropriate because "the National Guard is primarily under State control, as opposed to Federal control * * * " (S. Rep. No. 1502, 86th Cong., 2d Sess., p. 4; H. Rep. No. 1928, *supra,* p. 4) [24]—applies alike to all Guardsmen, whatever their capacity.

Petitioners rely—as did the Court of Appeals for the District of Columbia Circuit—upon a statement made by the then Deputy Attorney General, in connection with this legislation (Pet. Br. 48–49). A letter of the Deputy Attorney General as well as the oral testimony of a Department of Justice official stated that any legislation would be "unnecessary" with respect to civilian employees because of the "unbroken series of court decisions" holding the United States liable for torts committed by civilian National Guard employees. S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 11; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), p. 7. But the committees also had before them a recommendation from the Secretary of the Army which stated that the cases holding the United States liable for the negligence of National Guard caretakers were "at apparent variance

[24] The Congressional determination that the States, rather than the federal government, had control over the National Guard not in active federal service was made despite vigorous efforts of the sponsors of the original bill to show that there was sufficient federal control to warrant the imposition of tort liability upon the United States. Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), pp. 11–20.

with the long-held views of the Comptroller General of the United States * * * that such National Guard civilian employees * * * are State rather than Federal employees," and that "[t]he Supreme Court of the United States has not considered the question" so that "[t]here is * * * uncertainty as to the status of such employees with respect to coverage by [the Federal Tort Claims Act]." S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 6; H. Rep. No. 1928, 86th Cong., 2d Sess. (1960), p. 6; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), p. 54. The committee reports demonstrate that the resulting legislation was based on the recommendations of the Department of the Army. S. Rep. No. 1502, *supra*, p. 2; H. Rep. No. 1928, *supra*, p. 2. Hence it cannot be said that in enacting the 1960 legislation Congress presumed that the decisions permitting recovery against the United States for the negligence of caretakers were correct. Had Congress agreed with the *Holly* cases that negligence of civilian personnel of the National Guard was covered by the Federal Tort Claims Act, it would not have found it necessary to provide an administrative remedy for claims based on such negligence—a remedy supplied by the 1960 legislation. In according the same treatment to military and civilian personnel, upon the reasoning that the Guard was under State, rather than federal, control, Congress apparently did not accept the *Holly* line of decisions.

In providing that meritorious claims in excess of $5,000, based upon the conduct of Guard personnel,

be certified to it for its consideration (32 U.S.C. Supp. II) 715(d), p. 70, *infra*), Congress has demonstrated its preference for handling such matters through a process akin to the enactment of private bills. It took this step despite the fact that a major purpose of the Federal Tort Claims Act has been to reduce the burden caused by the introduction of private bills.[25] Congress concluded, in short, that claims founded upon the conduct of Guard personnel presented a special problem.

The issue presented by this case—whether the United States has assumed responsibility under the Tort Claims Act for the conduct of National Guard personnel, or has assumed it through some non-judicial remedy—is, of course, a question of policy to be determined by Congress. See *United States* v. *Gilman*, 347 U.S. 507, 511–513. In our view, the enactment of 32 U.S.C. (Supp. II) 715 shows that Congress decided to meet the moral obligations created by the federal government's relationship to the National Guard through non-judicial remedies.

C. THERE IS NO RATIONAL DISTINCTION, FOR TORT CLAIMS ACT PURPOSES, BETWEEN MILITARY AND CIVILIAN PERSONNEL OF THE GUARD

As we have demonstrated at pp. 15–25, *supra*, military personnel of the Guard have always been characterized by the courts as State employees for purposes of vicarious tort liability. This characterization is supported by the actual facts regarding the

[25] *Feres* v. *United States*, 340 U.S. 135, 140. See also *Dalehite* v. *United States*, 346 U.S. 15, 24–25; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68.

direction and control of National Guard members, by the language and purpose of the National Defense Act of 1916 and its subsequent amendments, and by Congressional approval of the rule that such personnel are not employees of the United States. The very same considerations apply with equal vigor to civilian employees of the National Guard. There is no material distinction, so far as Tort Claims Act liability is concerned, between military and civilian Guard personnel.

(1) *State supervision and control.*—Civilian employees of the Guard are, as we have shown (pp. 27–28, 31–35, *supra*), employed, supervised and discharged by officials responsible to the adjutants general of the States or by the adjutants general themselves, who are, in turn, responsible solely to the State governors. They are answerable to no different authority than are military personnel of the Guard. The power granted to the Secretaries of the Army and the Air Force to "designate the person to employ" caretakers is nothing more than a limited authority to select from among State officials to act in that capacity. See pp. 30–31, *supra;* S. Rep. No. 635, 74th Cong., 1st Sess. (1935), pp. 2–3. And the fact that caretakers are paid from federal funds certainly does not distinguish them from military Guardsmen whose compensation comes from the same source. The actual facts regarding direction and control of caretakers fully supports the conclusions reached by the dissenting judge in *Courtney* v. *United States,* 230 F. 2d 112, 115 (C.A. 2):

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> [E]xamination of the Defense Act itself reveals that the special authority of the Secretary of the Army with respect to caretakers extends only to the power to fix their salaries and designate by whom they are to be employed. 32 U.S.C.A. § 42. Apart from these powers he has no greater control over caretakers than over enlisted men and officers of the National Guard. With respect to all members of the federally recognized National Guard the Secretary has wide powers to prescribe regulations, but these are merely pursuant to the federal government's power to attach conditions to the use of federal funds; they do not indicate that members of the Guard have come under such control of the federal government as to be its servants. The Secretary of the Army himself would have no authority to issue an order directly to an officer or member of the Guard nor to the caretaker involved here. He may merely prescribe regulations to which the States must adhere if they wish to continue to receive federal funds for the employment of such caretakers.[26] * * *

In short, the relationship between the federal government and Guard caretakers employed under 32 U.S.C. 709 is similar to the relationship between the government and military personnel of the Guard, and both are analogous to employees of independent contractors who do work for the government. The au-

[26] Indeed, even this description errs in favor of federal control. While the amount of federal funds payable to certain Guard personnel under 32 U.S.C. 709 is fixed by the Secretary, State officials have the authority "to fix" the actual "salaries" paid to such employees, and do in fact fix that sum in amounts different from the amount of federal funds authorized. ANGR 40–01, par. 3b; NGR 51, par. 3a; R. 293–294.

thority to prescribe conditions and minimum standards is entirely different from the authority to supervise and control.

(2) *The language and purpose of the statute.*— Nothing in Section 90 of the National Defense Act of 1916 or in its subsequent amendments supports the distinction between military and civilian Guard personnel which the courts have drawn. The caretaker provision was adopted not to create positions for the execution of federal functions but to authorize payment from federal funds for the administration of State duties, just as the federal payment of military personnel was a means of subsidizing the State-controlled militia. Although title to the equipment and supplies which was to be administered by caretakers remained in the United States, the statute contemplated the States' assumption of responsibility for its maintenance and care. See Sections 82–89 of the National Defense Act of 1916, 39 Stat. 203–205, 32 U.S.C. 105(a)(1), 702(a)(d), 710(c). This appears clearly from the original legislation which empowered the States' unit "commanders" to select the caretakers from among the enlisted men in their unit. In addition, the legislative history indicates that Congress intended that the caretakers would carry out functions which could only be performed constitutionally by the States, such as the "supervision" or "training" of Guard members. H. Rep. No. 1031, 69th Cong., 1st Sess. (1926), p. 3; S. Rep. No. 785, 69th Cong., 1st Sess. (1926), p. 1. Hence there is no implication in the language or purpose of the caretaker provision that those employed under the authority of that statute

would be employees of the United States for any purpose whatever.

(3) *Subsequent Congressional action.*—Congress has never indicated that it considered civilian Guardsmen to be anything other than State employees, just as it has for military Guard personnel. In enacting 32 U.S.C. 715 in 1960, it provided an administrative remedy for tort claims against the United States attributable to the negligence of military or civilian personnel of the Guard; it did not distinguish between caretakers and other Guardsmen, although the cases drawing a distinction were called to its attention. For other purposes as well, as we have demonstrated (pp. 35–40, *supra*), Congress has grouped caretakers with military personnel and considered both to be State employees.

(4) *The court decisions.*—Having no basis at all in the actual administration of the technician program or in the prior or subsequent legislative consideration of the caretaker provision, the dichotomy between military and civilian Guard personnel is traceable entirely to a single decision of the Court of Appeals for the Tenth Circuit—*United States* v. *Holly*, 192 F. 2d 221—which, proceeding from erroneous assumptions, held that civilian personnel were meant to be different from military Guardsmen and that they were employees of the United States. The *Holly* case has been followed in four other circuits.[27] We believe

[27] *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9); *United States* v. *State of Maryland*, *for*

that *Holly* is wrong, and that the cases which followed it did so entirely on the authority of that decision, without any independent evaluation of the governing statute or the relationship of the federal government to these employees.

The basic mistaken premise of the *Holly* decision was its assumption that "[t]hrough the State Adjutant General, the Secretary of the Army and the Chief of the National Guard Bureau have complete control over the work of the caretaker, including his employment and discharge." 192 F. 2d at 223. The same erroneous assertion was made by the District of Columbia Circuit in its opinion in the *Meyer* case (322 F. 2d at 1013): "The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto." As we have demonstrated at pp. 20–21, *supra*, the adjutants general of the States are not responsible to the Secretaries of the Army or of the Air Force; their sole responsibility is to the governor or other executive official of the State. Hence the supervision exercised by the adjutant general is exclusively State supervision.

The court in *Meyer, supra*, also relied upon its belief that, because a civilian employee of the Guard is "paid by" the United States, "the ultimate right of control over him" is in the United States (322 F. 2d at 1013). But that argument goes too far. For the

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the Use of Meyer, 322 F. 2d 1009 (C.A.D.C.), pending no motion for leave to file petition for rehearing of denial of certiorari, No. 543, O.T. 1963.

"ultimate right of control" lodged in the United States by virtue of its paying the bill on specified conditions is no greater in the case of civilian personnel than in the case of Guard personnel in their military capacity, or in a host of other federally subsidized programs administered through the States or through independent contractors. And, as we have shown above, the employees of the States or of independent contractors are not employees of the United States within the meaning of the Tort Claims Act, notwithstanding the right of control "in an ultimate sense" (322 F. 2d at 1013) which always rests in the party who pays the bill.

The Tenth Circuit in *Holly* also apparently believed that the authority to employ caretakers was initially vested in the Secretary of the Army or the Secretary of the Air Force and that it was "delegated" to the adjutants general of the State by regulation. 192 F. 2d at 222.[28] This is simply a mistake of fact. The statute authorized the Secretaries to "designate" the persons to employ the caretakers, and, as we have shown (pp. 30–31, *supra*), this authority was limited to designations of State officials. The federal officials were never granted authority to employ the caretakers or to appoint other federal officers to carry out that function. Lastly, we note that the maintenance and care of federal property assigned to the Guard is not, as the court in *Holly* apparently believed, a federal

[28] This misconception may have been due in part to an unfortunate choice of language in the regulations themselves. See, NGR 75–16, par. 1, Pet. Br., p. A–5. Similar language is used in ANGR 40–01, par. 3b.

function, but is the function and responsibility of the States. 32, U.S.C. 105(a), 702 (a), (d), 710(c).

We submit, in summary, that the *Holly* case was wrongly decided, as were the subsequent decisions relying on *Holly* as authority. Neither *Holly* nor any later decision articulates a rational basis for distinguishing between military and civilian National Guard personnel for Tort Claims Act purposes. Petitioners' brief in this Court suggests no reason for such a distinction, and we believe that none exists.

II

IN ALL EVENTS, THE UNITED STATES IS NOT LIABLE FOR THE PILOT'S NEGLIGENCE BECAUSE HE WAS ACTING IN A MILITARY CAPACITY, UNDER THE DIRECTION AND CONTROL OF THE STATE OF MARYLAND, AT THE TIME OF THE COLLISION

We have argued above that members of the Guard are not federal employees in the sense of the Tort Claims Act, whatever the activity, military or civilian, in which they may be engaged. Even if they could properly be deemed federal employees in some limited or special sense, *e.g.*, because they are ultimately paid out of federal funds, that would not answer the question of the United States' responsibility for torts committed while they were under the actual direction and supervision of State officials. We have adverted in Point I to the considerations which make plain that State officials do control members of the Guard in the performance of their various duties. In addition, it is clear, as a matter of Maryland law, that an employer is liable

for the acts of his servant only on those occasions when he has the right to supervise and direct him. This reenforces the argument that in no meaningful sense was Captain McCoy a federal employee.

Here, we argue additionally that even if it could be said that he was a federal employee at such times as he performed in his civilian capacity, the fact of the matter is that the flight which led to the collision was conducted primarily in his military capacity and was under the exclusive control of State officials and officers of the Maryland Guard. Hence, under the Maryland law of *respondeat superior,* which controls this aspect of the case,[29] the United States is not liable.

A. UNDER THE APPLICABLE LAW, ONLY THE EMPLOYER HAVING THE RIGHT TO CONTROL THE PILOT'S FLIGHT MAY BE HELD LIABLE

The law of Maryland, like the law of most other States, imposes vicarious tort liability on an employer only if he has the right to supervise his employee in the very activity which gives rise to the accident. *E.g., Henkelmann* v. *Metropolitan Life Insurance Co.,* 180 Md. 591, 26 A. 2d 418; *Gallagher's Estate* v. *Battle,* 209 Md. 592, 122 A. 2d 93, certiorari denied, 352 U.S. 894; *Keitz* v. *National Paving & Contracting Co.,* 214 Md. 479, 491, 134 A. 2d 296; *Restatement, Agency 2d,* § 220, comment d; *id.* § 227. This rule is based upon the unfairness of imposing liability upon one person for the activities of someone over whom he has no control. *Henkelmann* v. *Metropolitan Life Ins. Co., supra,* 180 Md. at 598–599. Consequently, if an employee is loaned by his regular employer

[29] See *Williams* v. *United States,* 350 U.S. 857; *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Callaway* v. *Garber,* 289 F. 2d 171 (C.A. 9).

to another employer, and the latter has the exclusive right to supervise and direct the employee's activities, the regular employer is not responsible for the injuries arising out of such activities. *Bauer* v. *Calic*, 166 Md. 387, 401, 171 Atl. 713; *Salowitch* v. *Kres*, 147 Md. 23, 127 Atl. 643. Similarly, if an employee is shared by two employers who agree that control of the employee is to alternate between them, the employee "is the servant only of the one for whom he is acting at the moment." *Restatement, Agency 2d*, § 226, comment b, illustration 5.[30]

Assuming, for purposes of the present argument, that Captain McCoy was an employee of the United States when he was engaged in caretaker duties, he was also—under the consistent line of decisions previously discussed (pp. 15–25, *supra*)—an employee of the State of Maryland while engaged in a military capacity. Hence he was a "shared servant," with the United States and Maryland alternating as employer. Or he might equally be treated as a servant of the federal government for the greater portion of each week (while executing his full-time duties as a civilian employee hired under 32 U.S.C. 709), but on loan to the State of Maryland whenever needed for military duties. In either event, the determinative fact in imposing liability under the doctrine of *respondeat superior* would be whether the federal government or the State had the right

[30] If both employers retain concurrent authority to control the activities of the employee and the manner of their performance, liability may be imposed on both employers for the same conduct. *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 134 A. 2d 296; see *Restatement, Agency 2d*, § 226, comment b, illustration 4.

to control and direct the particular activity which gave rise to the accident.

The decision in *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954, illustrates this principle. In that case, an employee of the Public Health Service of the United States was loaned to a health project, which was to be carried out under the direction and supervision of a local health officer. It was conceded that the employee was generally in the employ of the United States within the meaning of the Tort Claims Act and that federal funds had been utilized in carrying out the project. The court held, however, that because he was under the exclusive direction and supervision of the local official, he was on loan to the local government. Accordingly, under the applicable Kentucky law, the United States was not liable for his negligent conduct.[31]

Also in point is the recent decision in *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911. In that case, the plaintiff sought to impose liability for a mid-air collision upon the United States for the asserted negligent acts of two pilots of jet fighter airplanes owned by the United States but assigned to the Wyoming Air National Guard. One of the pilots, in addition to being an offi-

[31] The relevant *respondeat superior* law of Maryland is the same as the law of Kentucky. Both condition the imposition of vicarious tort liability on a right to control the very activity giving rise to the injury. See *Henkelmann* v. *Metropolitan Life Insurance Co.,* 180 Md. 591, 601, 26 A. 2d 418, 423, relying upon *Leachman* v. *Belknap Hardware & Mfg. Co.,* 260 Ky. 123, 84 S.W. 2d 46.

cer in the Guard, was a full-time civilian air technician employed in that capacity as a flying training instructor.[32] 311 F. 2d at 606; P.R. 32.[33] At the time of the accident he was engaged in a training flight, was receiving pay as a civilian employee (311 F. 2d at 605), and was performing the function for which he had been employed in a civilian capacity—flying training (P.R. 60–61).

While holding that a civilian employee of the Guard receiving pay pursuant to 32 U.S.C. 709 is a federal employee,[34] the court refused to impose liability upon the United States. It said that the pilot was performing the flight under the exclusive control and command of the State and was carrying on the business of the State. Hence, under the *respondeat superior* principles of the law of Wyoming, the State was the only employer which could be held vicariously liable for the pilot's negligence.

The only decision to the contrary is *United States* v. *State of Maryland for the Use of Meyer*, 322 F. 2d 1009 (C.A. D.C.), certiorari denied, 375 U.S. 954, pending on motion for leave to file petition for rehearing, No. 543, O.T. 1963, which is the companion decision to this case and arose out of the same collision. The District of Columbia Circuit

[32] The other pilot was an officer of the Guard, and not a civilian employee. In accord with the consistent holdings cited at pp. 15–16, *supra*, the court held that he was an employee of the State and not of the United States. 311 F. 2d at 605–606.

[33] "P.R." references are to the printed record in *Pattno*, a copy of which has been made available to counsel for petitioner in this case.

[34] We disagree with that holding for reasons stated at pp. 15–47, *supra*.

based the imposition of liability on the United States in that case on the misapprehension that "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident." 322 F. 2d at 1013. It stated, in that connection, that the United States' control over National Guard employees is analogous to the direction which a plant owner has over his employees through his foreman. *Ibid.* Actually, however, the regulation imposed by the United States over the activities of Guard units is similar to the type of control exercised by a party over the conduct of the employees of an independent contractor. The State officials—be they the governor or the adjutant general—are like the executive officers of an independent contractor which has been given certain specifications to meet but retains ultimate control over the supervision and direction of its employees, as well as over their hire and discharge and their working conditions. See pp. 22–24, *supra;* R. 294–295. Since, as we shall show, no federal official had the right to direct Captain McCoy's superiors "in the performance of his work and the manner in which the work is to be done" (*Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296) with respect to the flight which resulted in the collision, the United States did not have any "ultimate right of control."

B. THE FLIGHT WAS CONDUCTED PRIMARILY IN THE PILOT'S MILITARY CAPACITY AND IT WAS SUBJECT TO THE EXCLUSIVE CONTROL OF STATE OFFICIALS

Captain McCoy, who sought permission to make the flight in question, and Lieutenant Colonel Kilkowski,

his commanding officer, who authorized and directed it, intended and understood that it was "a proficiency flight" (R. 108, 150–151). That understanding was confirmed by the flight order, which was signed by order of the commander of the 104th Squadron (R. 209), and by the flight clearance, which revealed that the purpose of the flight was "general training, operational training" (R. 207, 595–596). The district court so recognized, and found that a purpose of the flight was to maintain proficiency (R. 695, 697). The uncontroverted testimony is that "proficiency" is military terminology for "training," and a proficiency flight is the same as a training flight (R. 161–162). Accordingly, the findings of the district court themselves establish that the flight in question was a training flight.

It is equally clear (and is apparently conceded by petitioners) that when an officer pilot of the Guard who is also a civilian air technician flies an airplane on a training mission, he does so primarily in his military capacity.[35] Only officers of the Air National Guard and other military personnel are authorized to fly their airplanes, and these may fly only on valid military orders (R. 304, 697). Indeed, the only reason Captain McCoy was paid in a civilian rather than military capacity for the flight in question was that he had already flown the maximum number

[35] Captain McCoy, Col. Kilkowski, and a ranking officer of the Air National Guard all so understood and testified. See p. 5, *supra*. Captain McCoy's testimony is typical (R. 117–118): "I would not be on a flight in duty as a maintenance chief. I would be on the flight in my duty as a captain in the Air National Guard * * *. It is my belief that as an air technician, when I get in an airplane I become a Captain in the Air National Guard * * *."

of hours for which military pay was available (R. 697; see R. 153–154).

The order authorizing the flight in question and directing the route and time of departure and return was signed by order of the commander of the 104th Squadron, who was an officer of the Maryland Air National Guard and whose authority was derived from the Governor of Maryland through the adjutant general (R. 209, 293–295). No federal officer or employee was empowered to authorize or direct the flight, prescribe its route or time of departure, or otherwise control or supervise Captain McCoy's piloting of the airplane.

While the flight in question had no specific maintenance function or purpose, it is true that Captain McCoy, in his civilian capacity as air technician, observed the performance of the aircraft and its equipment, as well as other mechanical aspects of the flight. This, as his commanding officer stated, was "a secondary portion of any flight" (R. 163–164, 696–697). This "secondary" feature was related to his position as a civilian employee of the Guard. The district court (and the court of appeals in the *Meyer* cases) relied upon this dual aspect in imposing liability upon the United States. 322 F. 2d 1009; R. 697, 699.

This circumstance does not, however, suffice to render the United States liable for the pilot's negligence. For both the training and the maintenance aspects of the flight were the responsibility and business of the State. 32 U.S.C. 501(b), 105(a), 702 (a); (d), 710(e). And, as we have shown, the critical question

under Maryland law (as under the law of most States) is whether the employer on whom liability is sought to be imposed has the right to direct and control the performance of the task which gave rise to the injury.[36] Only State officials, acting in their capacity as officers of the Maryland National Guard, had the authority to tell Captain McCoy when, where and how to fly the airplane (R. 304). Moreover, the primary and official purpose of the flight was as a military training flight—to maintain Captain McCoy's proficiency. As Judge Hastie observed below, the fact that Captain McCoy might put to use in his civilian maintenance capacity the information he obtained on the flight "did not change the basic character of this training flight" (R. 725.)[37]

[36] Petitioners' contention that the Maryland presumption of agency arising out of the ownership of the airplane imposes liability upon the United States (Pet. Br. 51–52) is wholly untenable. In the first place the presumption was rebutted by the conceded fact that the airplane in question here was permanently assigned to the Maryland Air National Guard upon manufacture, more than one and a half years before the accident in question (R. 678). Secondly, the uncontradicted evidence as to the command and control over Captain McCoy would, under any circumstances, rebut the presumption.

[37] Petitioners' reliance upon the certification by Col. Ebaugh to the Bureau of Employee Compensation of the Department of Labor that Captain McCoy was working as a civil employee of the United States and not as a member of the Maryland National Guard. The court of appeals properly ruled that this admission was not binding or conclusive (R. 724). Moreover, Col. Ebaugh conceded that he had no personal knowledge of the facts concerning the flight in question (R. 243). Regardless of the admissibility of the certification, therefore, it clearly had no probative weight in face of the uncontradicted testimony of persons who did have personal knowledge of the facts in question.

III

THE DOCTRINE OF COLLATERAL ESTOPPEL IS INAPPLICABLE IN THE CIRCUMSTANCES OF THIS CASE

In their brief on the merits in this Court, petitioners assert that, under the doctrine of collateral estoppel, the judgment in the *Meyer* cases determined all the material issues in this case and required that judgment be entered for petitioners (Pet. Br. 59–60). In this claim, petitioners are supported by the *amici*, who are the plaintiffs in the *Meyer* cases. Brief of *Amici Curiae*, pp. 17–21. This newly asserted claim is insubstantial both because it is untimely and because it is based on erroneous premises regarding the law of collateral estoppel.

A. THE COLLATERAL ESTOPPEL CLAIM COMES TOO LATE

A claim of estoppel by judgment, like the assertion of res judicata or the defenses of release or statute of limitations, is not jurisdictional and must be asserted at the appropriate time in order to be heard. Rules 8(c), 12(a) and 12(h), Federal Rules of Civil Procedure. The final district court judgment in the *Meyer* cases preceded the judgments in this case by several days, and the decision of the District of Columbia Circuit was issued nine months before the Third Circuit's decision in this case. Petitioners did not, however, assert that they were entitled to judgment because of the collateral estoppel effect of the *Meyer* judgments in either the district court or in the court of appeals until after the decision of the court of appeals. Indeed, in requesting permission to proceed on the basis of the record printed in

the *Meyer* cases, petitioners expressly disavowed any such claim. They said, in a motion filed with the Third Circuit, that they "do not concede that the decision in the other cases are res judicata here." [38]

Moreover, although the petition for a writ of certiorari alluded to the doctrine of collateral estoppel, the two questions presented for review were not at all related to its application to the facts of this case (Petition, p. 3). The failure to raise the question in the court of appeals in a timely manner and squarely to present it to this Court bars petitioners from asserting it at this late hour. See *California* v. *Taylor*, 353 U.S. 553, 556, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; Rule 23(1)(c) of the Revised Rules of this Court.

B. THE COLLATERAL ESTOPPEL CLAIM IS UNSOUND ON THE MERITS

Petitioners' contention is that the United States is bound by the judgments in the *Meyer* cases on all issues of fact and law resolved there, notwithstanding the fact that the plaintiffs in those cases are total strangers to the petitioners here. Petitioners acknowledge that a judgment favorable to the United States would not have bound them in this litigation, but they contend that "mutuality" is no longer an essential element for collateral estoppel. Pet. Br. 59–60; Brief of *Amici Curiae*, pp. 18–20.

If petitioners' contention is valid, it would have an obviously unfair effect on defendants in multiple injury accidents. Passengers in a bus involved in a

[38] Appellees' motion for leave to file five photocopies of exhibits, to consolidate the appeals and for a twenty-day extension, in C.A. 3, Nos. 14041–14042 (February 11, 1963), p. 3.

highway accident might, for example, sue the driver of the other vehicle individually. A judgment exonerating the defendant from liability in any one or more actions would not bar a subsequent suit by other passengers. But once the defendant lost any one action, the remaining passengers, according to petitioners, could assert that judgment as binding in their actions under the principles advocated here by petitioners.

There can be little justification for such a novel rule, at least in the broad form suggested by petitioners. The very cases cited by petitioners and the *amici curiae* demonstrate that "the right, question or fact" determined in the first proceeding should "be taken as conclusively established" only "in a subsequent suit *between the same parties or their privies.*" *Southern Pacific Railroad Co.* v. *United States,* 168 U.S. 1, 48–49. (Emphasis added.) See *Partmar Corp.* v. *Paramount Corp.,* 347 U.S. 89, 91, 101–103; *Lawlor* v. *National Screen Service,* 349 U.S. 322; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352. The operation of collateral estoppel is justified only when the policy "that there be an end to litigation" overrides further inquiry into the facts or law; its primary justification is that "matters once tried shall be considered forever settled *as between the parties.*" *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U.S. 522, 525. (Emphasis added.) See *Restatement, Judgments,* § 93(h), comment d.

The cases that have held that lack of mutuality is not a bar to the assertion of estoppel by judgment have, by and large, involved the defensive use of collateral estoppel where the second defendant derived

his alleged liability from the exonerated defendant—*e.g.*, a master being sued after his servant was exonerated or an indemnitor after the indemnitee was found not liable. *E.g., Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 812–814; *Restatement, Judgments*, § 96, 99. The same rule would not apply to permit affirmative use of a judgment by a stranger against a defendant who has once been held liable. *E.g., Nevarov* v. *Caldwell*, 161 Cal. App. 2d 762, 327 P. 2d 111; *Elder* v. *New York Pa. Motor Express Inc.*, 284 N.Y. 350, 31 N.E. 2d 188.[39]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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[39] We have substantial doubts about the validity of the ruling in regard to collateral estoppel in *United Air Lines* v. *Wiener*, 335 F. 2d 379, 404–405 (C.A. 9). But even the decision in that case did not deprive the defendant of its right to appeal on legal questions.

703-326—65——6

APPENDIX

1. The Constitution of the United States provides in pertinent part:

> Art. I, Sec. 8
>
> The Congress shall have Power * * *
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *
>
> Art. II, Sec. 2
>
> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

2. The Federal Tort Claims Act provides in pertinent part (Title 28, United States Code):

> § 1346. United States as defendant.
>
> * * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

3. The National Defense Act of 1916 (39 Stat. 166 *et seq.*), as amended, provides in pertinent part (Title 32, United States Code):

a. Section 101. Definitions.

* * * * *

(4) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

* * * * *

(6) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

* * * * *

Section 105. Inspection.

(a) The Secretary of the Army shall have an inspection made at least once a year by inspectors general, or, if necessary, by any other commissioned officers of the Regular Army detailed for that purpose, to determine whether—

(1) the amount and condition of property held by the Army National Guard are satisfactory;

(2) the Army National Guard is organized as provided in this title;

(3) the members of the Army National

Guard meet prescribed physical and other qualifications;

(4) the Army National Guard and its organization are properly uniformed, armed, and equipped and are being trained and instructed for active duty in the field, or for coast defense; and

(5) Army National Guard records are being kept in accordance with this title.

The Secretary of the Air Force has a similar duty with respect to the Air National Guard.

(b) The reports of inspections under subsection (a) are the basis for determining whether the National Guard is entitled to the issue of military property as authorized under this title and to retain that property; and for determining which organizations and persons constitute units and members of the National Guard.

* * * * *

Section 106. Annual appropriations.

Sums will be appropriated annually, out of any money in the Treasury not otherwise appropriated, for the support of the Army National Guard and the Air National Guard, including the issue of arms, ordnance stores, quartermaster stores, camp equipage, and other military supplies, and for the payment of other expenses authorized by law.

* * * * *

Section 108. Forfeiture of Federal benefits.

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 109. Maintenance of other troops.

* * * * *

(b) Nothing in this title limits the right of a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia to use its National Guard or its defense forces authorized by subsection (c) within its borders in time of peace, or prevents it from organizing and maintaining police or constabulary.

(c) In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces. * * *

* * * * *

Section 314. Adjutants general.

(a) There shall be an adjutant general in each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia. He shall perform the duties prescribed by the laws of that jurisdiction.

* * * * *

(d) The adjutant general of each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him. Each Secretary shall send with his

annual report to Congress an abstract of the returns and reports of the adjutants general and such comments as he considers necessary for the information of Congress.

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Section 501. Training generally.

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

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Section 702. Issue of supplies.

(a) Under such regulations as the President may prescribe, the Secretary of the Army and the Secretary of the Air Force may buy or manufacture and, upon requisition of the governor of any State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the National Guard of the District of Columbia, issue to its Army National Guard and Air National Guard, respectively, the supplies necessary to uniform, arm, and equip that Army National Guard or Air National Guard for field duty.

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(d) No property may be issued to the National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care.

* * * * *

Section 709. Caretakers and clerks.

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be

spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

(f) The Secretary concerned shall fix the

salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them.

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Section 710. Reports of survey.

(a) All military property issued by the United States to the National Guard remains the property of the United States.

* * * * *

(c) The Secretary concerned or his designated representative may relieve the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, of further accountability and pecuniary liability for the property. However, if it was lost, damaged, or destroyed through negligence, the money value of the property or the damage thereto shall be charged (1) to the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, to be paid from its funds or from any non-Federal funds; or (2) to the member to whom the loss, damage, or destruction is charged from pay due him for duties performed in his status as a member of the National Guard.

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4. The National Defense Act of 1916 (39 Stat. 166), as amended, provides in pertinent part (Title 10, United States Code):

§ 3079. Army National Guard of United States: status when not in Federal service.

When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard.

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§ 3495. Army National Guard of the United States: status.

Members of the Army National Guard of the United States are not in active Federal service

except when ordered thereto under law.

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§ 8079. Air National Guard of United States: status when not in Federal service.

When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard.

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§ 8495. Air National Guard of United States: status.

Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law.

5. Public Law 86–740, September 13, 1960 (74 Stat. 878) provides in pertinent part (Title 32, United States Code, Supp. II):

§ 715. Property loss; personal injury or death; activities under certain sections of this title.

(a) Under such regulations as the Secretary of the Army or Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than $5,000 a claim against the United States for—

(1) damage to, or loss of, real property, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property, including property bailed to the United States or the National Guard and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the National Guard; or

(3) personal injury or death; either caused by a member of the Army National Guard or the Air National Guard, as the

case may be, while engaged in training or duty under section 316, 502, 503, 504, or 505 of this title or any other provision of law for which he is entitled to pay under section 301 of title 37, or for which he has waived that pay, and acting within the scope of his employment; caused by a person employed under section 709 of this title acting within the scope of his employment; or otherwise incident to noncombat activities of the Army National Guard or the Air National Guard, as the case may be, under one of those sections.

* * * * *

(d) If the Secretary of the military department concerned considers that a claim in excess of $5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $5,000 and report the excess to Congress for its consideration.

* * * * *

(g) Notwithstanding any other provision of law, the settlement of a claim under this section is final and conclusive.

(h) In this section, "settle" means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance.

6. The Constitution of the State of Maryland provides in pertinent part (Article II, Section 8):

> The Governor shall be the Commander in Chief of the land and naval forces of the State; and may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the Laws; but shall not take the command in person, without the consent of the Legislature.

7. The Maryland Code Ann., Article 65, provides in pertinent part:

§ 6. Governor to be commander-in-chief.

The Governor of the State, by virtue of his office, shall be the commander-in-chief of the militia of the State, except as of such portions as may at times be in the service of the United States.

The Governor shall have power to make such rules and regulations and issue orders for the enlistment, discharge, organization, discipline, training and equipment of the militia from time to time as may become necessary in order to conform to this article and the National Defense Act, and amendments thereto and regulations made in pursuance thereof.

* * * * *

§ 8. When ordered into service of State.

The Governor shall have the power in case of insurrection, invasion, tumult, riot, breach of peace or imminent danger thereof, or to enforce the laws of this State, to order into service of the State any part of the militia that he may deem proper. * * *

§ 9. Adjutant General; assistant adjutant general; Governor's staff.

The Adjutant General shall be appointed by the Governor by and with the advice and consent of the Senate. * * *

§ 10. Ranking line officer—In general.

The ranking line officer shall be on active duty status and his salary shall be as stated in the annual budget; provided, that should the ranking line officer be also appointed the Adjutant General, he shall receive only the salary provided by law for the ranking line officer; and provided further, that, should the ranking line officer be called or ordered into the active military service of the United States, under the Constitution and laws of the United States, the Governor may designate an acting ranking line officer, who will exercise all the duties of the office during such period.

The ranking line officer shall be in control of the Military Department of the State, and subordinate only to the Governor in matters pertaining to said department. * * *

§ 11. Same—As Quartermaster General.

The ranking line officer, as Quartermaster General, shall be responsible to the Governor for the care, preservation and safekeeping of all military property. He shall prepare returns of all federal military property at the time and in the manner prescribed by the Secretary of War [Secretary of the Army]. * * *

* * * * *

§ 16. Workmen's compensation insurance.

The ranking line officer is authorized and directed to take out and thereafter maintain a policy or policies of insurance with the State Accident Fund or with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State, to secure compensation under the Workmen's Compensation Law to all officers and enlisted men of the organized militia of the State of Maryland; provided that, whenever and so long as provision equal to or better than that given under the terms of this article is made by the federal government for an officer or enlisted man or employee of the Military Department of Maryland injured in the course of employment, such officer, enlisted man or employee shall not be entitled to the benefits of this section.

The ranking line officer is authorized and directed to pay the necessary premium or premiums for said policy or policies of insurance out of appropriations for the militia to be included in the State budget by the Governor of the State.

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§ 20. Same—Appointment and commission.

All officers shall be appointed and commissioned by the Governor * * *.

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§ 26. Responsibility of organization commanders; responsibility of officers and enlisted men to commanding officers; inspections.

Organization commanders may cause those under their command to perform any military duty, and shall be responsible to the Governor for the general efficiency of the units of the organized militia under their commands. Commanding officers of units shall be responsible to their immediate commanders for the equipment, drill, instruction, movements and efficiency of their respective commands. All officers and enlisted men shall be responsible to their immediate commanding officers for prompt and unhesitating obedience, proper drill and the preservation and proper use of the property of [the] State and of the United States, or organization, in their possession. * * *

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8. The Air National Guard Regulations (ANGR) 40–01 provide in pertinent part:

SECTION I—GENERAL

* * * * *

2. Policy:

a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of—

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

* * * * *

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to their civilian position.

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp. Gen. Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in

part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

* * * * *

6. Qualifications. Air National Guard civilian personnel shall be qualified as follows:

a. Technically qualified to perform the duties of the position for which being employed without further schooling or training at the expense of the government; *and*

b. Physically qualified for active Federal service if the position for which employed requires membership in the Air National Guard.

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

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SECTION II—FINANCIAL

8. Air National Guard Civilian Man Months and Funds. Man months and funds will normally be authorized and published prior to the beginning of each fiscal year.

a. The number of man months programmed for each State, Territory, Puerto Rico, or the District of Columbia, is basically computed upon the following:

(1) The number of military personnel assigned to each base.

(2) The number and type of aircraft projected for assignment to each base.

(3) Number of positions, per unit, organization or office authorized for each base.

(4) Availability of man months.

b. Funds for temporary personnel programmed are based upon the following:

(1) Availability of funds.

* * * * *

10. Pay and Per Diem:

a. *Salary and Wages.* Federal funds paid to Air National Guard civilian personnel shall not exceed the rates established by the Chief, National Guard Bureau. Any payments in excess of the established rates must be from other than Federal funds. Air National Guard civilian personnel may be paid either semi-monthly or monthly, as directed by the adjutant general. District of Columbia employees may be paid bi-weekly. Payment will be made by the USAF finance officer designated in AFM 173–20, as amended, to pay commercial accounts and civilian pay rolls for the Air National Guard.

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SECTION III—BENEFITS

12. Social Security. Air National Guard civilian personnel are eligible to be covered by the provisions of the Social Security Act, as amended, unless such personnel are under an existing retirement system. Employer's contribution may be paid from the same funds used for the pay of the individual.

13. Employees Compensation. Current policy of the Bureau of Employee's Compensation, United States Department of Labor permits compensation to be paid for injuries or death incurred by Air National Guard civilian personnel in the performance of their official duties.

14. Retirement. Air National Guard civilian personnel are not included in the Federal Civil Service Retirement System.

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